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No. 357

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1950.

ALTON BOX BOARD COMPANY, BLACKMER & POST PIPE COMPANY, LACLEDE-CHRISTY CLAY PRODUCTS CO., OLIN INDUSTRIES, INC., and SCULLIN STEEL CO.,
Petitioners,

vs.

MISSISSIPPI RIVER FUEL CORPORATION and INTERSTATE NATURAL GAS COMPANY, and the ILLINOIS COMMERCE COMMISSION,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit.

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To the United States Court of Appeals for the Fifth Circuit.

Petitioners pray that a writ of certiorari issue to review the judgment and decree of the United States Court of Appeals for the Fifth Circuit, entered on July 15, 1950, in the case there entitled "**Interstate Natural Gas Company v. Federal Power Commission et al.**" No. 10701 on the docket of said Court.

OPINIONS BELOW.

The opinion of the Court of Appeals (Record, p. 131) is reported in 181 F. (2d) 833.

JURISDICTION.

The judgment of the Court of Appeals was entered on July 15, 1950 (Record, p. 141). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

STATUTE INVOLVED.

The Natural Gas Act, June 21, 1938, c. 556, § 24, 52 Stat. 833, 15 U. S. C. §§ 717-717w.

QUESTION PRESENTED.

Are ultimate consumers of natural gas who purchased directly from an interstate pipe-line company at rates which were not then regulated by any state agency entitled to share in a fund impounded by the Court of Appeals while review was had of a Federal Power Commission order reducing the rate for natural gas charged to the pipe-line company by its supplier, or should the portion of the fund created by the purchases of such consumers be awarded to the pipe-line company which had in no way passed on to them the benefit of the reduced rate?

STATEMENT.

The question raised here stems from a previous decision by this Court in this cause in which it reversed an order of the Court of Appeals for the Fifth Circuit awarding the impounded funds to the pipe-line companies. **Federal Power Commission v. Interstate Natural Gas Co.**, 336 U. S. 577, 93 L. ed. 895, 69 Sup. Ct. 775 (1948). Although this was the second review of the case by this Court, the present petitioners did not previously appear in the matter. It was only as a result of this second opinion that they were brought into the proceedings.

Prior History of the Case.

The initial litigation arose as a result of an order of the Federal Power Commission which asserted jurisdiction under the Natural Gas Act over the rates charged for natural gas by Interstate Natural Gas Company (hereinafter called "Interstate"), a producer, purchaser and gatherer of natural gas operating intrastate in Louisiana. Interstate sold natural gas to various interstate pipe-line companies, including the Mississippi River Fuel Corporation (hereinafter called "Mississippi"). The Federal Power Commission determined that the rates charged by Interstate were excessive and ordered a reduction therein. Reviews of this order were made by the Court of Appeals for the Fifth Circuit and by this Court. The fund under consideration was impounded during the pendency of that litigation, the reduction order being stayed and Interstate being required to pay into the registry of the Court of Appeals the amount by which its rate exceeded the rate fixed by the Commission. It was finally determined that the Federal Power Commission had jurisdiction to fix the rates of Interstate and the order of the Commission reducing the rates was sustained. 331 U. S. 682, 91 L. ed.

1742, 67 Sup. Ct. 1482. At the conclusion of this phase of the litigation, the problem first arose as to whom this fund should go. The pipe-line companies which were Interstate's customers claimed the fund. Certain state and municipal agencies also intervened, claiming the fund for the ultimate consumers of natural gas. The Court of Appeals ruled that the fund should be returned to those from whom the excessive payments had been exacted, i. e., the pipe-line companies, among them Mississippi. 166 F. (2d) 796.

By petitions for certiorari the Federal Power Commission and the state and local regulatory bodies brought this ruling before this Court, which reversed the decision of the Court of Appeals, and remanding the case, directed that it distribute the impounded fund in accordance with the opinion of this Court. This Court instructed the Court of Appeals to look beyond the pipe-line companies and place the funds in the hands of the ultimate consumers who were the intended beneficiaries of the Natural Gas Act.

Thereafter Mississippi, in co-operation with the Federal Power Commission and the regulatory agencies of those states wherein it had sold gas, attempted to work out an arrangement for the distribution of that part of the impounded fund attributable to payments made by Mississippi to Interstate (Record, p. 2). This segment of the fund amounted to $1,484,582.53 (Record, p. 13). The arrangement settled upon allowed payment of a ratable portion of this segment of the fund to the local distributors of natural gas who had purchased from Mississippi for resale, the distributors in turn to pass these funds along to their customers, the ultimate consumers of gas. The sum to be passed on to consumers was only $545,002.36, considerably less than half of the excess payments made by Mississippi. But Mississippi River Fuel Corporation

still took the position that it was entitled to receive that portion of its segment of the impounded fund which represented payments made by it for natural gas sold to industrial consumers who purchased their gas directly from Mississippi. Thus, Mississippi would receive the considerable sum of $939,580.17 (Record, p. 13). Mississippi recognized that its claim to these moneys was not beyond question and attempted to obtain disclaimers from the industries which were its consuming customers during the impoundment period (Record, p. 24). These industrial consumers of natural gas had not previously known of the existence of the fund. Some of them signed disclaimers; a number refused to do so. Mississippi also encountered further difficulty in that the Illinois Commerce Commission refused to assent to the plan. When Mississippi reached this impasse it embodied its plan in a proposed decree and submitted this to the Court of Appeals, praying that an order issue to show cause why that portion of the funds collected from Mississippi should not be so distributed.

Entry of Petitioners Into the Cause.

An order to show cause was accordingly issued March 2, 1950, returnable March 17, 1950 (Record, p. 40). This order was directed to all of the consumer customers of Mississippi and was sent to them by mail. It was at this point that petitioners were first brought into the litigation.

The petition of Mississippi seeking the fund (Record, pp. 1-35) stated that it was a natural gas company within the meaning of the Natural Gas Act, that it purchased natural gas from Interstate, which it transported in interstate commerce and sold to local utility companies for resale and to industrial customers in the States of Missouri and Illinois for direct consumption. It averred that in Missouri and Illinois there is no state regulation of its direct sales of natural gas to consumers (Record, p. 3).

It also set out the exact amounts of the impounded fund allocable to its various consuming customers (Record, pp. 5-7 and 9-11). Petitioners' contributions to this fund, as stated by Mississippi, are as follows:

Alton Box Board Company	$34,795.28
Blackmer & Post Pipe Company	4,791.54
Laclede-Christy Clay Products Co.	45,849.53
Olin Industries, Inc.	15,331.48
Scullin Steel Co.	62,398.51

Mississippi made no allegation and offered no proof that it had in any way passed on to its consuming customers the benefit of the rate reduction.

Responses to the petition of Mississippi and the order to show cause were filed by many of the consuming customers opposing the entry of the decree proposed by Mississippi and praying that shares of the fund attributable to gas purchased by them be paid to them (Record, pp. 41-85 and 128 to 130). On the designated day counsel for many of the consuming customers* appeared in the Court of Appeals to assert the claims of such purchasers to a share in the fund.

The Court of Appeals, after determining what parties were represented by counsel, agreed to hear argument of one attorney on behalf of consuming customers in Illinois and one on behalf of consuming customers in Missouri. In addition, in the course of the day's proceedings, the Court heard counsel for the Federal Power Commission, Mississippi, Interstate, the Illinois Commerce Commission and the Missouri Public Service Commission.

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* Alton Box Board Company, Blackmer & Post Pipe Company, General Steel Castings Corporation, Granite City Steel Company, Laclede-Christy Clay Products Company, Laclede Steel Company, Owens-Illinois Glass Company, Scullin Steel Co. and Western Cartridge Company. Several other industrial users filed responses to the order to show cause, but did not appear in court on the return day.

No attorney representing a regulatory commission argued that the claims of Mississippi's consuming customers were unfounded. The representative of the Federal Power Commission stated that the Federal Power Commission took no position in regard to the matter. The representative of the Missouri Public Service Commission stated that the Missouri Commission had no jurisdiction over direct sales by pipe lines to consumers. The representatives of the Illinois Commerce Commission urged that Mississippi's consuming customers be allowed to share in the distribution of the fund.

After allowing time for the filing and consideration of briefs, the Court of Appeals handed down its opinion on May 9, 1950 (Record, p. 131), in which it upheld the position of Mississippi and expressed its intention to enter the decree submitted by Mississippi in its petition, with an addition thereto providing for the distribution by the Illinois utility companies to their customers of the sums which were to be paid to them.

A decree was accordingly prepared and was finally entered by the Court of Appeals on July 15, 1950 (Record, p. 141). It is this decree which petitioners now pray this Court to review.

SPECIFICATIONS OF ERRORS TO BE URGED.

The Court of Appeals has erred in its interpretation of the opinion of the Supreme Court in that:

1. It has ruled that Mississippi River Fuel Corporation, an interstate pipe-line company, may receive that portion of the impounded fund which resulted from direct payments for natural gas made to it by ultimate consumers, whereas the Supreme Court directed that the Court of Appeals look beyond the pipe-line companies for the rightful claimants of the fund.

2. It has ruled that the legal rights and the equities of these consumer-customers to a share in the impounded fund are inferior to those of the interstate pipe-line carriers from whom they purchased natural gas.

STATEMENT OF REASONS RELIED UPON FOR ALLOWANCES OF WRIT.

1. The decision of the Court of Appeals involves new and significant issues:

(a) The question presented to the Court was an important one as to the meaning of the Natural Gas Act and the authority of the Federal Power Commission.

(b) In determining this matter, the Court passed upon the claims of a class of natural gas consumers which had not previously appeared in cases of this sort. Petitioners here are members of this new class of claimants.

2. The issues which were before the Court of Appeals are likely to be presented to the Courts again, as the Federal Power Commission will doubtless regulate the rates of many producers of natural gas who sell to interstate pipe-line companies, now that it has adequate precedent to rely upon in so doing. When such orders are reviewed by the Courts of Appeal, funds like the one here in question will be again created and consumers of natural gas, who, like these petitioners, purchased directly from pipelines, will again seek to share in them. It is thus essential that the Courts and the Commission be guided by the Supreme Court as to the rights of such claimants and the proper distribution of such funds.

3. The opinion and decree of the Court of Appeals is in conflict with the opinion and mandate in which this Court instructed the Court of Appeals as to the disposition of the fund in question. This is due to a complete disregard and misinterpretation of what was said by this Court. If the opinion of this Court is allowed to stand erroneously interpreted by the Court of Appeals for the Fifth Circuit, only confusion can result as to what is actually the law of this subject.

ARGUMENT.

I.

The Courts of Appeal not infrequently impound excess rates pending their review of rate reduction orders made by the Federal Power Commission pursuant to its authority under the Natural Gas Act, 15 U. S. C., Sections 717 et seq. However, the instant case happens to be the only one of which petitioners are aware in which moneys were impounded which derived from payments made by consumers who purchased natural gas directly from a pipe-line carrier and whose rates were not state regulated. Hence the case is in that respect unusual and presents a new and heretofore unresolved question of law of considerable national importance.

It is a question likely to arise again as the veto by the President of the United States of the "Kerr Bill," H. R. 1758, a bill to amend the Natural Gas Act, leaves established the law as announced by this Court in its first decision in this case, i. e., the Federal Power Commission will continue to have the power to regulate sales in interstate commerce by producers and gatherers of natural gas. In view of the rapid expansion of the natural gas market and the rising prices which result from increased demand, the Federal Power Commission will doubtless in the future find it more and more necessary to fix the rates charged by producers to pipe lines,[1] and such regulation is almost sure to result in future litigation involving the same problems which the instant petition presents.[2]

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1 See President's Message Vetoing Natural Gas Amendment, April 15, 1950, H. R. Doc. No. 555, 81st Cong., 20 Sess.

2 Several cases examining closely related problems have already reached appellate courts since the opinion of the Supreme Court in Federal Power Commission v. Interstate Natural Gas Co., 336 U. S. 577, 93 L. ed. 895, 60 Sup. Ct. 775 (1948). See Cities Service Gas Co. v. Federal Power Commission, 176 F. (2d) 548 (C. C. A. 10th, 1949); Straube v. Bowling Green Gas Co., 227 S. W. (2d) 669 (Mo. Sup., 1950).

Thus, although the problem presently comes up in connection with the distribution of a fund at the end of prolonged litigation and at first glance might seem to be a matter of little consequence, it is closely bound to the larger problems of the intended scope of the Natural Gas Act and the power and jurisdiction of the Federal Power Commission.

When the Federal Power Commission undertook to regulate the rates charged by Interstate to various pipe-line companies, it must be assumed that it did so in the interest of the ultimate consumers of natural gas, for consumers are the intended beneficiaries of its activity and it has no authority to act except in their interest.

Federal Power Commission v. Interstate Natural Gas Co., 336 U. S. 577, 93 L. ed. 895, 69 Sup. Ct. 775 (1948);

Federal Power Commission v. Hope Natural Gas Co., 320 U. S. 591, 88 L. ed. 333, 64 Sup. Ct. 281 (1944).

The Federal Power Commission could not have intended to benefit the pipe-line companies. It has no authority to prefer them over producers. The Natural Gas Act was primarily directed against interstate pipe-line companies, as they were beyond the power of the individual states. Control of these particular companies for the benefit of others was the major object of Congress in passing the Act.

Federal Power Commission v. Hope Natural Gas Co., 320 U. S. 591, 88 L. ed. 333, 64 Sup. Ct. 281 (1944)[3];

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[3] "The primary aim of this legislation was to protect consumers against exploitation at the hands of natural gas companies. Due to the hiatus in regulation . . . state commissions found it difficult or impossible to discover what it cost interstate pipe-line companies to deliver gas within the consuming states; and thus they were thwarted in local regulation. Moreover, the investigations of the Federal Trade Commission had dis-

Mississippi River Fuel Corp. v. Federal Power Commission, 121 F. (2d) 159 (C. C. A. 8th, 1941);
Cities Service Gas Co. v. Federal Power Commission, 176 F. (2d) 548 (C. C. A. 10th, 1949).

An examination of the legislative history of the Natural Gas Act reveals nothing which indicates that Congress meant to exclude industrial consumers from the protection of the Act or in any way to distinguish them from other ultimate consumers. The Congress was in fact interested in seeing to it that industries be enabled to obtain natural gas.[4] Industrial consumers purchasing gas from local public utilities are, of course, specifically protected by the Act.[5]

It is not and has never been the national policy to discriminate against industrial consumers of natural gas or to restrict in any way their use of gas. Such restriction is deemed advisable by advocates of the conservation of natural resources, but this Court has ruled that there was no Congressional intent to regulate industrial use when the Natural Gas Act was passed. The status of industrial users is, therefore, the same as that of any other ultimate consumers.

Federal Power Commission v. Hope Natural Gas Co., 320 U. S. 591, 88 L. ed. 333, 64 Sup. Ct. 281 (1944).

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closed that the majority of the pipe-line mileage in the country used to transport natural gas, together with an increasing percentage of the natural gas supply for pipe-line transportation, had been acquired by a handful of holding companies. State commissions, independent producers, and communities having or seeking the service were growing quite helpless against these combinations. These were the types of problems with which those participating in the hearings were preoccupied. Congress addressed itself to those specific evils." **Federal Power Commission v. Hope Natural Gas Co.,** 320 U. S. 591, 610, 88 L. ed. 333, 349.

4 See the statement printed in the Congressional Record by Senator Burton K. Wheeler, 83 Cong. Rec., pp. 2422-2424 (1938), and especially the following quotation: "Many communities are crying for natural gas for needed industrial power and fuel . . ."

5 "(b) The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, . . ." 15 U. S. C., § 717b.

Since the Federal Power Commission reduced the rates of Interstate for the benefit of ultimate consumers of natural gas, it necessarily follows that the impoundment, suggested and approved by the Commission, of all of the money resulting from sales to Mississippi implemented the purposes of the Natural Gas Act and was for the benefit of all ultimate consumers who obtained natural gas from Mississippi, direct consumers as well as utility purchasers for resale.

This should have been in the minds of the members of the Court of Appeals in ruling upon the distribution of the impounded fund. In a proceeding such as this for the distribution of the funds it is true that it cannot be determined just how or how much various ultimate consumers would have benefited had it not been for the act of the Court in staying the rate order. The distribution of the fund necessarily had to be based upon a somewhat arbitrary determination as to what would probably have happened. However, the Court of Appeals completely ignored the purpose of the Federal Power Commission in regulating rates and the reason for its own impoundment order in deciding that industrial consumers of gas would have received no benefit whatsoever from the Power Commission's rate reduction and that a pipe-line company, which was not intended to benefit at all, would have succeeded in benefiting itself to the extent of pocketing all of that portion of the excess rate which it paid for gas sold to industries.

The effect of this holding is to suggest that the Federal Power Commission might legally regulate the rates of natural gas in such a way as to increase the profits of pipeline companies. This is a startling departure from what was previously considered to be the law, i. e., that the Federal Power Commission was to regulate pipe-line and

other natural gas companies for the benefit of ultimate consumers.[6]

Furthermore, if a regulated natural gas company is to be the recipient of such funds, there is no reason for impounding them in the first place, as the impoundment results only in an unwarranted preference of one natural gas company over another.

Of course, had these funds representing natural gas sold directly to industrial consumers not been impounded, Interstate would have continued to receive the higher rate on that portion of gas during the litigation and the moneys now in controversy here would have been in its coffers, although the rate charged by Interstate was determined by the Commission and the Courts to be excessive.

But there is no reason why this result is any more absurd, illegal or unjust than the result reached by the Court of Appeals in handing these funds to the pipe lines. Interstate surely has as much claim as Mississippi to enjoy profits resulting from the flow of natural gas to industrial purchasers, and it would have seemed inconceivable prior to this litigation that the Federal Power Commission should have authority to act in such a way as greatly to prefer one natural gas company to another!

It was against such a possible result that Senator Kerr directed his efforts as he urged the passage of the bill referred to, supra, page 10, which was intended to alter the law as defined by this Court in the initial opinion in this case. During the course of the Congressional debate after Senator Douglas had stated that he hoped Congress would defeat the Kerr amendment and thus continue the authority of the Commission to regulate independent producers, Senator Kerr exclaimed:

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6 The Natural Gas Act actually denies the Federal Power Commission the power to order increases in the rates of natural gas companies. 15 U. S. C., § 717d (a).

". . . I should like to ask the Senator from Illinois if he is aware of the fact that the interstate transporters sell about one-sixth of all the gas they transport to industrial consumers; that such sale is not regulated by the Commission, and that there is no control on the interstate carriers of the profits they may make in the sale of that part of the gas which they sell; and that the suggestion he has made would result in the amazing situation of the independent producer being entirely regulated as to what price he could receive, and the pipe-line company itself, which was created as a monopoly, would be unregulated in the amount of profit it could make on the part that it now sells direct to industrial consumers or which it may choose to sell in that market in the future?" 96 Cong. Rec., March 16, 1950, p. 3501.

It is apparent that Senator Kerr and the Congress, which passed the amending bill, did not desire this "amazing situation" to result from their legislative efforts.

Petitioners feel that it is equally clear that this Court did not intend this to result from its opinions in this case. However, the Federal Power Commission has been uncertain as to the meaning and effect of these opinions and the members of Congress were admittedly confused in March, 1950.[7] The Court of Appeals for the Fifth Circuit has now

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[7] Senator Johnson (of Colorado): "The committee feels that it is necessary now to adopt an amendment to the Natural Gas Act of 1938 in order to eliminate the confusion which exists in the Federal Power Commission and in the natural-gas industry with respect to the interpretation of the Natural Gas Act and the jurisdiction of the Federal Power Commission thereunder, following the Supreme Court decision in the so-called **Interstate Natural Gas Co. case** (331 U. S., p. 682)." 96 Cong. Rec., March 16, 1950, p. 3497.

Senator Kerr: ". . . the situation is about as confused as it can be." 96 Cong. Rec., March 17, 1950, p. 4147.

Senator Johnson (of Texas): "Why are we considering this legislation? What makes it necessary for the Senate to debate the question now before us? The answer is this: The Federal Power Commission, the agent of Congress, is unable to determine what the law of the land says with regard to Federal jurisdiction over independent producers and gatherers of natural gas." 96 Cong. Rec., March 20, 1950, p. 4351.

added to the confusion with its latest decision in this case awarding to a pipe-line company the benefits of a rate reduction order.

As the Congress by Presidential veto was prevented from clarifying the situation and from making the law conform to its wishes, it has become highly important for this Court to say whether or not the law as announced by it may be interpreted in such a way as to bring windfalls to pipe-line companies, the very companies against which Congress directed its efforts in enacting the Natural Gas Act.

Petitioners respectfully submit that the Court of Appeals for the Fifth Circuit has committed serious error in its interpretation of this important federal statute and in its view of the purpose and effect of the regulatory activities of the Federal Power Commission, an important federal agency. The regulation of sales of natural gas in interstate commerce being a matter of general national concern, and problems of the type arising in the instant case being likely to recur frequently before the Courts of Appeals in future rate-review proceedings, the question presented in this petition merits further consideration by this Court.

II.

The consideration of the problem by this Court is made even more important by the existence of a conflict between its previous opinion upon this subject and the opinion of the Court of Appeals which purports to follow the opinion and mandate of this Court.

The situation which presently obtains leaves the law in complete confusion. The Court of Appeals has disregarded and misinterpreted the opinion of the Supreme Court and has set out its misinterpretations in its own

opinion, with the result that those who may subsequently seek guidance upon the law of this subject will be unable to determine what it is.

When the problem of distribution of the impounded fund first arose in the Court of Appeals, that Court awarded all of the fund to the pipe-line companies. On certiorari to this Court, the order of the Court of Appeals was reversed and this Court directed the Court of Appeals to look beyond the pipe-line companies for the rightful claimants to the impounded fund. Despite this very specific direction, the Court of Appeals has once again ordered that a large portion of the fund be paid to a pipe-line company.

This Court opened its previous opinion by stating that the pipe-line companies could not have this fund unless it was clear as a matter of federal law that they were entitled to it. Upon an examination of the federal law, this Court found no basis for the pipe-line company's claim. But the Court of Appeals has again ruled otherwise.

The Supreme Court in its opinion said the basis of the claim stated in the petitions of the pipe-line companies for intervention was "that they are entitled to the fund as of right, since it was created by their payments" and then this Court held that "we would be unmindful of the purpose of the Act [Natural Gas Act] and the responsibility of the federal courts under it, if we so ruled."

The Court of Appeals, totally disregarding this portion of the Supreme Court's opinion, states in its opinion as follows: ". . . We think it quite plain that, at least, prima facie, these moneys are the property of Mississippi and must be distributed to it, unless superior claims to it, in law or in equity, are shown."

Petitioners respectfully submit that this portion of the opinion of the Court of Appeals is in direct and irreconcilable conflict with the opinion of the Supreme Court.

Thus passing over the basic holdings of the Supreme Court, the Court of Appeals goes on to state that a "careful reading" of the opinions of the members of the Supreme Court leave it without doubt that its duty "is to find out in the best way it can and determine what law and equity, in each of the states where the money was collected, demands as to the just distribution of the excess funds collected, by Interstate from Mississippi."

This is a fair statement of what the Supreme Court did indeed hold to be the duty of the Courts of Appeals, but by the time the Supreme Court had reached this point in its opinion, it had already held (and it is this that the Court of Appeals chooses to disregard) that the pipe-line companies were not to share in the fund and that the Court of Appeals in making such distribution as equitable principles should demand, was **"to look beyond those companies . . ."**

The Court of Appeals, having made its fundamental error in disregarding the principal holding of the Supreme Court, proceeds to compound this error while purportedly following the mandate of the Supreme Court.

First, it finds "no basis in the law of contract for ordering Mississippi to refund to its direct industrial customers any of the money it collected from them pursuant to these contracts. . . ." This statement, of course, results from the Court of Appeals' erroneous premise, i. e., that this fund is prima facie Mississippi's and that other claimants have the burden of showing why Mississippi should not have it. The Court in its sympathy for the pipe-line companies apparently cannot help regarding the situation as

one in which Mississippi is being called upon "to refund" something.

It goes on in the same way to dismiss summarily any possible equitable claim of the industrial consumers, using in its anxiety to dispose of this problem a reductio ad absurdum which again shows its fixed idea that these moneys are the property of the pipe-line companies:

> ". . . if this court, on the theory of unjust enrichment to Mississippi by returning to it **its own money** [Emphasis added] which it had paid out, were to order these moneys paid over to the Industrial customers, it would then, on the same principle, have to order them in turn to pay them over to the contract consumers of their goods, and so on, ad infinitum."

Having shut its eyes tightly and rushed by the major hazards to its hope of awarding Mississippi this fund, the Court of Appeals hastens on to find that no local regulatory law assists the industrial consumers and approves the plan submitted to it as "just, fair, and reasonable."

Petitioners respectfully submit that the law should not be left in the present state of conflict and confusion and that the gross error of the Court of Appeals should not be allowed to stand.

While the previous opinion of this Court would normally be expected to serve as a guide in further litigation, the opinion of the Court of Appeals is more recent and purports to interpret or apply the opinion of the Supreme Court, which in fact it disregards. In these circumstances, the law remains much in doubt. The question is one which is almost certain to recur and petitioners feel that this Honorable Court should grant this their application for writ of certiorari correcting the error which has been committed and clarifying the law for them and for those who in the future may be involved in similar litigation.

CONCLUSION.

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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Respondents,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR RESPONDENT, MISSISSIPPI RIVER FUEL CORPORATION, IN OPPOSITION.

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November 13, 1950.

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Natural Gas Act §§1(b), 19(c) (52 Stat. 821) 15 U. S. C. §§717(b), 717r(c) 2, 8

Miscellaneous

Report of Federal Power Commissioners Smith and Wimberly to Congress, "Natural Gas Investigation" (Docket G-580) (1948) 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 357.

ALTON BOX BOARD COMPANY, BLACKMER & POST PIPE COMPANY, LACLEDE-CHRISTY CLAY PRODUCTS CO., OLIN INDUSTRIES, INC., and SCULLIN STEEL CO.,

Petitioners,

vs.

MISSISSIPPI RIVER FUEL CORPORATION, INTERSTATE NATURAL GAS COMPANY, INC. and THE ILLINOIS COMMERCE COMMISSION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR RESPONDENT, MISSISSIPPI RIVER FUEL CORPORATION, IN OPPOSITION.

Opinion Below.

The opinion of the United States Court of Appeals for the Fifth Circuit (R. 131) is reported at 181 F. 2d. 833.

Jurisdiction.

The opinion and judgment of the Court of Appeals was filed May 9, 1950 (R. 131). The formal decree adopted in said judgment was entered July 15, 1950 (R. 141). Petitioners seek to invoke this Court's jurisdiction under 28 U. S. C., Section 1254 (1).

Question Presented.

Where a natural-gas company sells gas for resale and also for consumption, may it be awarded overcharges paid by it to a supplying natural-gas company when the amount of such overcharges concededly relates to natural gas purchased for direct sale for industrial consumptive use if no local law or regulatory process inhibits such distribution and the privately negotiated arms length contract of sale to the direct industrial consumer does not provide for a reduction in price?

Statute Involved.

Section 1(b) of the Natural Gas Act (52 Stat. 821 (1938), 15 U. S. C. § 717(b)):

> "The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."

Statement.

Petitioners' statement is in large measure a correct one. Certain details of it, however, must either be corrected or enlarged upon.

At page 4, petitioners assert that this Court in *Federal Power Commission et al.* v. *Interstate Natural Gas Company et al.*, 336 U. S. 577, instructed the Court below to look beyond Mississippi and place the fund in the hands of ultimate consumers—the intended beneficiaries of the Natural Gas Act. This Court gave no such instruction. In remanding the case to the Court of Appeals for further proceedings, this Court clearly delineated between those sales of Mississippi River Fuel Corporation ("Mississippi") which are controlled by federal law, and those controlled by local law. Whether ultimate consumers would receive any part of the fund was to be judged by local law. This Court left no doubt on that score when it noted that it could not be known whether reductions would reach industrial users either by virtue of their contracts or by virtue of the assertion of local regulatory authority. This Court went on to state:

> "If in this situation local law provides a standard for determining which of two or more claimants would have been entitled to the benefits of the rate reduction, the federal courts should apply it. If clear and speedy state remedies are available, the federal court might hold the fund until those having the final say on the state law questions have spoken. * * * But in absence of such a showing the federal court in the interest of dispatch should proceed to determine the questions, relying on such sources of local law as may be available, including information from state regulatory agencies." (*Federal Power Commission* v. *Interstate Natural Gas Co.*, 336 U. S. at pp. 583-4)

Therefore, the Court below was correct in considering the dual role occupied by Mississippi, i.e. as a natural-gas com-

pany selling gas for resale and as a direct seller of gas for consumption to industrial consumers, *inter alia*, petitioners.

At page 5, petitioners claim that Mississippi realized the questionable character of its claim since it attempted to obtain disclaimers from industries to which it sold gas directly for consumption. This procedure was no confession of weakness but was an attempt on the part of Mississippi to make the plan which it submitted to the Court below simple and completely effective. This Court had indicated that two factors might operate to place a portion of the fund in the hands of direct industrial consumers of Mississippi (either by contract or by virtue of state regulatory processes). Consequently, the disclaimer method was a direct approach to the problem and aided the Court below in that administrative process which it had to carry out pursuant to the order of this Court (R. 131-132).[1]

Petitioners' claims represent a total of $163,166.34 out of the total of $939,580.17 of excess charges paid by Mississippi for gas sold directly to industrial consumers. The five petitioners in this docket along with the four in the petition in No. 356 represent the total of only nine direct industrial consumers of Mississippi who claim a right in the impounded funds and their total claims amount to $467,618.79. Mississippi sells gas to fifty-five direct industrial consumers, twenty-two of whom recognized that they had no claim; seventeen, did not appear in the Court below and show cause; and two now have apparently abandoned any previously asserted claim (R. 135-136).

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[1] "Distribution of the fund should not involve prolonged litigation. It is an administrative matter involving the exercise of an informed judgment by the federal court and should have the flexibility and dispatch which characterize the administrative process." (336 U. S. at 584)

Contrary to petitioners' statement (petition, p. 7) the Missouri Public Service Commission signed the stipulation agreeing that petitioners were not entitled to any part of the funds (R. 16, Item 6; 18). Of the petitioners on this petition, Blackmer & Post Pipe Company, Laclede-Christy Clay Products Company and Scullin Steel Company purchased gas from Mississippi in Missouri. The companion petition (No. 356) involves the claims of direct industrial users in the State of Illinois only. Aside from this fact, however, the claims of Mississippi's direct industrial consumers are the same and what Mississippi says in response to the companion petition is applicable here as well.

Argument.

The argument in this petition parallels to some extent that made in the petition at No. 356 of this Term. The petitioners make common cause and common mistake. This petition, however, is such a tedious repetition of error on error as to make an answer on the merits of the case practically impossible. What is required appears to be a succinct elucidation for the benefit of the petitioners of the exact regulatory situation which exists under the Natural Gas Act. It apparently has escaped petitioners entirely that Mississippi occupies two regulatory spheres. The first is with respect to sales which are made to public utility distribution companies for resale, wherein the policy and coverage of the Natural Gas Act is supreme and exclusive. The second is with respect to sales which are made directly for consumptive use to industries such as petitioners and here the state may act in the constitutional sense—the only question being whether the state has enacted local law (*Panhandle Eastern Pipe Line Company* v. *Public Service Commission of Indiana,* 332 U. S. 507). With an apprecia-

tion of the dual role occupied by Mississippi, therefore, short shrift can be made of the purported arguments and reasons which petitioners assert for the granting of the writ.

This Court made it clear that the rights of the pipe line companies as natural-gas companies under the Natural Gas Act depend upon federal law. It is this basis of federal law that the Court outlined in these words:

> "Moreover, if the pipe-line companies passed on to their customers the rate reductions from the date of the Commission's order (as Mississippi alleges it did), they would be entitled to a return of the payments they made into the fund. They would then have done all that was in their power to effectuate the policy of the Act in this regard. But apart from those exceptions, it is the duty of the court to look beyond those companies for the rightful claimants of the fund." (336 U. S. at 582)

Whether the utility distributing companies or their consumers should receive the fund depends upon local law (336 U. S. 577, at 583).

At this point, petitioners commit the error of assuming that it is federal law that governs the relationship between them and Mississippi. Petitioners are consumers, purchasing from Mississippi and their rights depend upon the law of Illinois or Missouri. Since petitioners' argument is based upon an erroneous concept of what law applies to their claims, their whole false structure collapses.

The fallacy of petitioners' contention that this Court directed the Court below not to award any portion of the fund to Mississippi is demonstrated in Mississippi's opposition brief in No. 356 and need not again be repeated.

I.

Importance of the Question.

Petitioners start off their argument and reasons for the issuance of the writ by stating that:

> "the instant case happens to be the only one of which petitioners are aware in which moneys were impounded which derived from payments made by consumers who purchased natural gas directly from a pipe-line carrier and whose rates were not state regulated" (petition, p. 10).

Petitioners go on to state that, therefore, there is an unresolved question of law of national import (petition, p. 10). In the opinion in *Federal Power Commission* v. *Interstate Natural Gas Company, Inc.* (336 U. S. 577), this Court certainly dealt with the whole question before it at that time, including the right of direct industrial customers of Mississippi and other pipe lines similarly situated to share in the excess charges which had been impounded. In fact, here there are no problems in this case arising under the Natural Gas Act remaining unresolved. Mississippi initiated a plan of distribution whereby all excess charges paid for gas which Mississippi purchased for sale to utility distribution companies for resale are forever out of Mississippi's hands. The Court approved this plan and the funds are being distributed as prescribed by the appropriate state regulatory agencies in Arkansas and Missouri and to ultimate consumers of such gas sold for resale in Illinois under the decree of the Court (R. 11-24, 144).

The most appalling error occurs in the outright assertion of petitioners that Congress in enacting the Natural Gas Act did not mean to exclude direct industrial consumers from

the protection of the Act, or in any way to distinguish them from ultimate consumers of local utility distributing companies (petition, p. 12). The Natural Gas Act was intended to fill a gap in the regulatory situation and direct sales of gas sold in interstate commerce directly for consumption were not held to be beyond the pale of state processes at the time of the enactment of the Natural Gas Act (see *Pennsylvania Gas Company* v. *Public Service Commission,* 252 U. S. 23). Of course, the true regulatory situation is set forth by this Court in its opinion in *Panhandle Eastern Pipe Line Company* v. *Public Service Commission of Indiana* (332 U. S. 507), a case not cited by petitioners and obviously either not read or understood by them. An equally erroneous comment is that industrial users purchasing from public utility distribution companies are protected by the Act (petition, pp. 12-13). It is axiomatic that the Natural Gas Act regulates sales only between a pipe line company and a distribution company.

Another erroneous allegation is that, absent impoundment, Interstate would have continued to receive the excess charges (petition, p. 14). Without the stay and impoundment the lower rates would have gone into effect as ordered by the Commission (Natural Gas Act, § 19(c), 52 Stat. 831, 15 U. S. C. 717r(c)). Thus, Mississippi would have paid the lower rate and petitioners would have continued to pay the prices fixed in their contracts. Petitioners then assert that the result reached by the Court below is just as absurd as allowing Interstate to keep the excess charges. Again, petitioners have failed to recognize that all of the sales by Interstate to Mississippi were sales for resale regulated by the Natural Gas Act. Mississippi, however, performing a dual role makes some sales regulable under the Natural Gas Act, but its direct sales for consumptive use are not so regulable.

The reference to the Kerr Bill is without pertinency since that legislative proposal dealt with sales by producers to natural-gas companies. Furthermore, the quotation from Senator Kerr (petition, p. 15) indicates a confusion equal to that of petitioners. Apparently, both Senator Kerr and petitioners have not learned that the Natural Gas Act was not directed against sales by pipe lines directly to industrial consumers (*Panhandle Eastern Pipe Line Company* v. *Public Service Commission of Indiana,* 332 U. S. 507), but only against sales to distributing utilities for resale to domestic and other consumers.

II.

The Decision of the Court Below Is Correct.

Making common cause with other petitioners before this Court, petitioners here state that this Court in announcing the law of the case directed the Court below to look beyond the pipe line companies for the rightful claimants to the impounded funds. This direction was made to the Court below only in respect of the Federal law specifically stated by this Court to be the Natural Gas Act and, therefore, applicable only to sales for resale (336 U. S. 577, 580). The Court below did not disregard this portion of this Court's direction. By its decree, it ordered the excess charges paid by Mississippi for gas sold for resale in Arkansas and Missouri to be returned through state regulatory channels to those parties deemed entitled thereto by the Arkansas and Missouri Commissions.

The Illinois Commerce Commission would not join in the plan approved by the Arkansas and Missouri Commissions but the Court with the approval of Mississippi and the Federal Power Commission saw to it that the amounts

attributable to sales for resale in Illinois would reach ultimate domestic users (R. 144).

The previous holding of this Court in the general refund matter squarely covers the situation here. This Court held:

> "If the pipe-line companies had passed the rate reductions on to the distributing companies, those reductions may or may not have reached the ultimate consumers." (336 U. S. at 583)

In this case the funds will reach all Illinois domestic consumers purchasing gas from distribution companies. It also will pass down the line under the orders of the Missouri and Arkansas Commissions (R. 143). This problem, therefore, is not in issue, but has been resolved completely in accordance with this Court's direction.

This Court went on to state (336 U. S. at 583):

> " * * * We likewise do not know whether the reductions would have reached the industrial users either by terms of the contracts or by virtue of the assertion of regulatory authority.
>
> "If in this situation local law provides a standard for determining which of two or more claimants would have been entitled to the benefits of the rate reduction, the federal court should apply it."

In this case, admittedly under their contracts there is no right in these petitioners to claim a portion of the excess charges (R. 133-134). Local law not only provides no standard for determining that petitioners have a claim superior to Mississippi's under the contracts, but in the states where Mississippi makes all of its direct sales for conumption the state commissions have definitely disclaimed authority over Mississippi's sales for consumption within their borders (R. 26—Missouri; R. 28—Illinois).

Here, the Court has made a careful appraisal of the facts, of the law and of the equities (R. 136-140). It determined that petitioners as against Mississippi have no claim to the fund. The contracts between Mississippi and petitioners were the result of arms length bargaining and set a price unregulable under existing local law and not subject to change on account of a decrease in the cost of the commodity to Mississippi. Mississippi in making these direct industrial consumption contracts was dealing on a competitive basis and not as one having a monopoly in the fuel usable by petitioners (R. 138; Report of Federal Power Commissioners Smith and Wimberly to Congress, "Natural Gas Investigation" (Docket No. G-580) (1948), pp. 336-337, 339, 340-341, 344). Petitioners have contented themselves with claiming that Mississippi who paid the excess charges does not have the equities in its favor which the Court below found. Petitioners have not shown any equity, let alone superior equities in their favor.

The plain answer to whether the Court below attended to the opinion of this Court on the law of the case can best be ascertained by a reading of that clear and concise pronouncement. There can be no doubt that the Court below did everything within its power to permit all parties to show facts, law or equity in their favor. Petitioners, like those others so situated, and like the Illinois Commerce Commission, failed to do so. In spite of this, the Court below made a careful analysis of the complete situation and came forth with the only possible judgment. This case presents nothing new, nothing novel, and nothing important in natural gas jurisprudence. There is no conflict or confusion except in the minds of petitioners who object to the fact that they did not receive any share in the refund to which they have not proven any claim either in law or equity.

Conclusion.

For the reasons stated herein, the Petition for Certiorari should be denied.

Respectfully submitted,

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